



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Honorable Joe B. Browning
County Judge
Nueces County
Corpus Christi, Texas

Dear Sir:

Opinion No. O-6606

Re: Under the provisions of Section 19, Senate Bill No. 74, Regular Session, 45th Leg., can Nueces County engage in construction projects to widen a present highway or pave a dirt road without supervision of a registered professional engineer, where the total expenditure exceeds \$3,000.00? And other questions.

We are in receipt of your communication of May 22, 1945, requesting an opinion from this department on the above stated matters. Under the provisions of Art. 4399, V. A. C. S., opinions from this department are to be given only to the officials named in said article. However, in view of the absence of your County Attorney and County Auditor, and in view of the urgent nature of your request, we are making an exception and advising you with reference to your inquiry. We quote from your request as follows:

- "1. Can the County engage in the construction of road or highway, without supervision of a registered professional engineer where the total expenditure exceeds \$3,000.00 by letting separate contracts for parts of the work or performing the work as separate units, each for less than \$3,000.00? Otherwise stated, may the Commissioners divide the construction of, say, a mile of highway into sufficient parts or sections that each costs less than three thousand dollars and term the units each a 'completed project' or does the Act contemplate the entire mile to be a 'completed project'?

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- "2. What is 'road maintenance or betterment work' within the provisions of the Act? Otherwise stated, would the work, say, to create a three lane highway of what formerly was a two lane highway be 'road maintenance or betterment work' exempt from the requirements of the Act? Would the work, say, to change the road from an earth graded road to a surfaced road be 'road maintenance or betterment work' exempt from the requirements of the Act?
- "3. Revised Statutes, Art. 2368a, requires competitive bidding for construction and materials.

May the Commissioners' Court limit the bidding to materials from a particular locality by designating its geographical name, 'Blankville Gravel', or must the gravel or other material, not patented, be specified by other characteristics so as to permit bids on other like materials from other geographical location?"

Section 19, Article 3271a, V. A. C. S., provides:

"After the first day of January, 1938, it shall be unlawful for this State, or for any of its political subdivisions, for any county, city, or town, to engage in the construction of any public work involving professional engineering, where public health, public welfare or public safety is involved, unless the engineering plans and specifications and estimates have been prepared by, and the engineering construction is to be executed under the direct supervision of a registered professional engineer; provided, that nothing in this Act shall be held to apply to any public work wherein the contemplated expenditure for the completed project does not exceed Three Thousand (\$3,000.00) Dollars. Provided, that this Act shall not apply to any road maintenance or betterment work undertaken by the County Commissioners' Court."

We note that in the above quoted section, the provisions of the Act are not applicable when the work is "road maintenance or betterment work" undertaken by the County Commissioners' Court. In the case of Dallas County et al vs. Plowman, (Sup. Ct.) 91 S.W.

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221, the Court construed the term "maintenance", as said term was used in the following language of Art. 8, Sec. 9 of the Constitution of Texas:

"The legislature may pass local laws for the maintenance of the public roads and highways, without the local notice required for special or local laws."

In discussing the term "maintenance", the Court said:

"The literal meaning of the word 'maintenance' would not include the laying out or construction of a road, but would relate to the repair and improvement of roads already laid out and constructed."
(Emphasis ours)

However, the court held that the term as used in Art. 8, Sec. 9, of the Constitution of Texas, supra, should not be construed literally, but should be given a more liberal interpretation in view of the necessity of a fair and reasonable application of the term in connection with the relevant provisions of the Constitution, and held that the term included the laying out and construction of roads as well as repair and improvement. (To the same effect see Smith v. Grayson County, 44 S. W. 921 (Tex. Civ. App.); Garrett v. Limestone County (Civ. App.) 230 S. W. 1010, reversed on other grounds (Com. App.) 236 S. W. 970; 238 S. W. 894; Hughes v. Harris County, (Civ. App.) 35 S. W. (2d) 818; Dallas County v. Plowman, 91 S. W. 221 (Tex. Sup. Ct.); Handy v. Johnson, 51 F. (2d) 809; Quinn v. Johnson, Tex. Civ. App., 91 S. W. (2d) 499; Tarrant County v. Shannon, 104 S. W. (2d) 4; and Crow v. Tinner, 47 S. W. (2d) 391.)

It is apparent that the term "maintenance" as used in Sec. 19 of Art. 3271a is not used in the same context as the term was used in Art. 8, Sec. 9 of the Constitution of Texas referred to in the above cited cases. However, under the literal interpretation of the term "maintenance" (Dallas Co. et al vs. Plowman, supra), it would include repairs and improvements of roads already laid out and constructed.

With reference to the term "betterment", we quote from Webster's New International Dictionary, 2nd Edition, as follows:

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"betterment."

1. A making or becoming better; amendment; improvement.
2. Law. An improvement of an estate which renders it better than mere repairing would do. Betterment includes any addition to, or alteration of the condition of the estate which is not a mere act of restoration involved in repair, whether new buildings, new appliances, improved draining, opening or widening of adjacent streets, etc.
3. Nelson, any improvement of a highway, railway, business establishment or the like, that does more than restore it to its former good condition. . . . (underscoring ours)

According to Bouvier's Law Dictionary, Vol. 1, the word "betterments" ordinarily means improvement to property, better than mere repairs. (Citing *Haddock vs. Tullison*, 11 Me. 462; *Davis' Lessee vs. Powell*, 13 Ohio 308; *McKinly vs. Holliday*, 10 Yerg (Tenn.) 477; *Thompson vs. Gilman*, 17 Vt. 109.)

In view of the above and foregoing authorities with reference to the terms "maintenance" and "betterment", it is our opinion that when the County Commissioners' Court undertakes to create a three lane highway of what formerly was a two lane highway, or to change a road from an earth graded road to a surfaced road, such work would be "road maintenance or betterment work" of the type exempt from the requirements of Sec. 19, Art. 3271a. Since we think that the type of work referred to in your inquiry is not subject to the provisions of said article, we shall not herein pass upon your question with reference to dividing the proposed road into parts or sections wherein the cost of each part or section would be less than \$3,000.00.

With reference to your third question, which concerns the authority of the Commissioners' Court in connection with limiting the bidding on certain materials to materials from a particular locality, we refer you to Articles 2368a and 1659, V. A. C. C.

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Art. 2368a provides in part:

"No county acting through its Commissioners' Court, and no city in this State, shall hereafter make or enter into any contract or agreement for the construction of any public building, or the prosecution and completion of any public work requiring or authorizing any expenditure in excess of Two Thousand Dollars (\$2,000.00), creating or imposing an obligation or liability of any nature or character upon such county, or any subdivision of such county, or upon such city, without first submitting such proposed contract or agreement to competitive bids. Notice of the time and place when and where such contract shall be let shall be published in such county. . . . once a week for two consecutive weeks prior to the time set for letting such contract, the date of the first publication to be at least fourteen days prior to the date set for letting said contract, and said contract shall be let to the lowest responsible bidder, on the respective type of construction selected. The Court and, or, governing body shall have the right to reject any and all bids, and said bidder shall be required to give good and sufficient bond in the full amount of the contract price, and provided further, that it (this provision) shall not be applied to contracts for personal or for professional services, nor to work done by such county or city and paid for by the day, as such work progresses. . . ."

Art. 1659 provides:

"Supplies of every kind, road and bridge material, or any other material, for the use of said county, or any of its officers, departments, or institutions must be purchased on competitive bids, the contract to be awarded to the party who, in the judgment of the commissioners court, has submitted the lowest and best bid. The county auditor shall advertise for a period of two weeks in at least one daily newspaper, published and circulated in the county, for such supplies and material according to specifications, giving in detail what is needed. Such advertisements shall

state where the specifications are to be found, and shall give the time and place for receiving such bids. All such competitive bids shall be kept on file by the county auditor as a part of the records of his office, and shall be subject to inspection by any one desiring to see them. Copies of all bids received shall be furnished by the county auditor to the county judge and to the commissioners' court; and when the bids received are not satisfactory to the said judge or county commissioners, the auditor shall reject said bids and re-advertise for new bids. In cases of emergency, purchases not in excess of one hundred and fifty dollars may be made upon requisition to be approved by the commissioners' court, without advertising for competitive bids."

Although the Commissioners' Court is given broad discretionary powers with respect to establishing and setting specifications for materials and supplies to be purchased and used by the county, when the county advertises for bids in pursuance of the provisions of either of the above quoted statutes, it is apparent that the objects of the statutes are to secure fair competition upon equal terms to all bidders, to secure the best values for the county at the least expense, and to afford an equal advantage to all desiring to do business with the county by affording an opportunity for an exact comparison of bids. (Wyatt Metal & Boiler Works vs. Tarrant County, (Tex. Civ. App.) 111 S. W. (2d) 787; Hoster vs. Belote, (Sup. Ct. Fla.) 138 So. 721; Poyner vs. Whiddon, (Sup. Ct. Ala.) 174 So. 507.)

In the case of Webster vs. Belote, supra, the court said:

"It has been generally recognized and held by the courts that it is the duty of public officers charged with the responsibility of letting contracts under the statute to adopt, in advance of calling for bids, reasonably definite plans or specifications, as a basis on which bids may be received. Such officers, in view of such requirement,

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are without power to reserve in the plans or specifications so prepared in advance of the letting the power to make exceptions, releases, and modifications in the contract after it is let, which will afford opportunities for favoritism, whether any favoritism is actually practiced or not. Neither can they include other reservations which by their necessary effect will render it impossible to make an exact comparison of bids. Clark vs. Nelson, 42 Fla. 230, 89 So. 495; Dillon, Municipal Corp., para. 307, page 1211; 15 U. J. 550; 19 A. C. L. 1070; 3 McQuillan on Municipal Corp. (2nd ed.) pages 385, 386."

In view of the foregoing authorities, it is our opinion that the materials on which bids are called for should be specified by characteristics that would permit bids on such materials whereby it would be possible to make a fair comparison of bids on materials of that nature, and such specifications should not be limited in a manner that would eliminate fair competition upon equal terms to all desiring to do business with the county with respect to that particular material.

We trust that the foregoing fully answers your inquiries.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By

J. A. Ellis
J. A. Ellis
Assistant

JAE:LF

APPROVED MAY 26 1945

Carl F. Bailey
FIRST ASSISTANT
ATTORNEY GENERAL

